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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JERRY ALLEN JUDSON, Defendant and Appellant.	G042246 (Super. Ct. No. RIF 127190) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Rodney L. Walker and Christian F. Thierbach, Judges. Affirmed as modified.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Jerry Allen Judson guilty of first degree murder and premeditated attempted murder. (Pen. Code, §§ 187, subd. (a); 664; all statutory citations are to the Penal Code unless indicated). The Attorney General concedes the first degree murder conviction must be reduced to second degree murder because the prosecutor elected at trial to proceed solely on a theory of implied malice, which constitutes second degree murder under these facts. Defendant contends the prosecution did not charge, and the jury did not find, defendant willfully deliberated and premeditated the attempted murder. Finally, defendant argues the trial court erred by failing to instruct the jury they must unanimously agree on which act constituted attempted murder. For the reasons expressed below, we affirm the judgment as modified.

I

FACTUAL AND PROCEDURAL BACKGROUND

In the early evening of November 22, 2005, defendant and his 15-year-old son Allen were outside their Moreno Valley home when Chris Wahl and Dennis Dixon arrived to buy marijuana. Wahl dated Dixon's daughter and she had arranged the transaction with defendant.

The men and Allen spoke outside for awhile and then stepped inside to smoke marijuana in defendant's living room. Only candlelight illuminated the room because defendant's electricity had been shut off a few months earlier. As they smoked, defendant spoke "gibberish" and talked in riddles.

About 20 to 30 minutes later, the candle burned out and the room turned dark. Defendant abruptly stood up and walked to the garage, followed by Allen. Defendant retrieved a shotgun from a compartment in his truck. Allen asked his father what he was doing, but defendant did not respond. Defendant walked back inside toward

the living room and Allen followed. Defendant pointed the shotgun toward Wahl and Dixon and announced he "wasn't messing around" and the gun was not a toy. He cocked the gun and demanded the men put down their guns, although neither was armed. Dixon claimed defendant said "which one of you guys want to get it first."

Defendant told Allen to illuminate the room with his cell phone. Defendant told the men they had until the count of three to surrender their weapons. On "three" defendant fired the shotgun from about 12 feet away.

Dixon ran out the back door of the house. Defendant yelled, "Hey, motherfucker, where are you going?" Defendant followed Dixon briefly as he fled out the back door. Defendant came back inside and said, "[T]he other one hopped the fence and got away." Forensic evidence suggested a second shot may have been fired at Dixon as he fled the scene. Defendant returned to the garage with Allen. Allen tried to start his father's truck to no avail. Defendant said "they fucked with the truck" and asked Allen to push start him on his dirt bike while he held the shotgun on his lap. When the motorcycle did not start, defendant started rolling down the street and screamed for help, firing the shotgun into the air. He got off the motorcycle and sat in the street. According to Allen, defendant was "freaking out," yelling "they're after us. They're after us" and insisted "they were there to kill us."

When deputies arrived, defendant urged them to hurry because the suspects were probably down the street. Police disarmed and arrested him. They found the mortally-wounded Wahl inside the house pleading for help, and he identified defendant as his assailant. Wahl later died from gunshot wounds to his chest and abdomen. Dixon received a gunshot wound to his left arm.

Blood drawn six hours after the shooting revealed, according to a toxicologist, an "abuse level" of methamphetamine in defendant's system. A detective believed defendant was still under the influence of methamphetamine at the police station the morning after the homicide.

Defendant told officers he was not expecting Dixon, and he believed Wahl and Dixon were there to "get rid of me." He explained the situation "didn't seem right to me" and he feared the men were going to gun his son and him down with small semi-automatic machine guns. The victims blew out the candle and he heard something like a gun, then the light from the mobile phone went out. He warned the victims he was going to shoot. He ran to the garage and discovered the truck had been sabotaged. He thought other people were in the bushes waiting to gun him down and therefore he fired three more times to summon help from the police. When the deputies arrived, he felt lucky to be alive.

Defendant admitted firing the shotgun twice inside the house. A neighbor heard two shots, testifying "it seemed like it took forever" between the shots, although he told an officer at the scene it could have been seconds.

Defendant had exhibited odd and erratic behavior before the homicide. A month or two before the shooting defendant showed another neighbor his electrical panel and claimed someone had been messing with him by cutting his power off and that if he could identify the culprit he would "blow his fucking head off." A few weeks later, defendant ran up and down the street without any pants for no apparent reason.

Allen testified his father had been using methamphetamine heavily in the months before the shooting. A few weeks before the incident, four men with guns visited

their home. Defendant acted strangely in the hours before the shooting, and at times cried for no apparent reason.

In May 1993, defendant and his wife Sharon Judson argued for days when he learned she had been unfaithful to him. At one point, he locked her in their mobile home while ranting bible verses. On another occasion, he pointed a shotgun at her and asked if she wanted to die.

Sharon Judson testified defendant had been a methamphetamine addict for years, but stopped using drugs when he gained employment as a truck driver in 1995. He suffered a trucking accident in 2003, and turned to drugs to alleviate chronic leg pain. He lost about 100 pounds in the period between the accident and the shooting.

Defendant's son Arleigh testified his father had been saying "crazy" things in the months leading up to the shooting. Defendant had difficulty sleeping and continued to lose weight. Arleigh coincidentally called defendant during the incident and heard his father yelling, "Show me it."

A defense psychologist opined chronic methamphetamine abuse can induce psychosis, which may result in paranoia and delusions that can form the basis of goal-driven behavior. He opined a person in defendant's situation might believe his life was in danger.

Following trial in October 2008, a jury convicted defendant of the first degree murder of Wahl, the attempted murder of Dixon, and found he discharged a firearm when he committed both crimes. (§ 12022.53, subd. (c).) In January 2009, the court sentenced defendant to 25 years to life for first degree murder, plus a consecutive 20-year sentence for discharging a firearm, a consecutive sentence of seven years to life

with the possibility of parole for the attempted murder, and a consecutive 20-year term for discharging a firearm.

II

DISCUSSION

A. *The Parties Agree Defendant's Murder Conviction Must Be Reduced to Second Degree*

The prosecutor formally elected at trial to pursue a murder conviction solely under a theory of implied malice to prevent the jury from considering evidence of defendant's voluntary intoxication. (See § 22.)[1] The prosecutor argued defendant consciously disregarded the risk to human life in firing the shotgun and emphasized the intoxication evidence was not relevant to the murder charge. The court instructed the jury accordingly.[2]

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[1] Section 22 provides: "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. [¶] (b) *Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.* [¶] (c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance." (Italics added.)

Demonstrating a fundamental misunderstanding of murder law, the prosecutor argued defendant premeditated and deliberated Wahl's implied malice killing.

[2] The prosecutor told the court he was "just going to narrow it to implied malice." The court told the jury, "The murder charge Count One [contains] the element of implied malice rather than 'express malice.' Voluntary intoxication is, therefore not relevant to Count One." It also informed them, "The People rely on and intend to prove that the malice involved in [Count One] was implied . . . ."

Section 189 defines the degrees of murder: "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree." The trial court, however, instructed the jury a murder committed with implied malice constituted first degree murder.

The Attorney General concedes an unlawful killing committed with implied malice is, with a few exceptions not applicable in this case, second degree murder, and therefore the trial court erred when it erroneously instructed the jury that a murder based on implied malice constituted first degree murder. We accept the Attorney General's concession and will direct the trial court to modify the judgment to reduce defendant's murder conviction to second degree.

B. *Defendant's Due Process Rights Were Not Violated*

Defendant contends he suffered a due process violation because the prosecution failed to allege separately a deliberation and premeditation allegation per section 664 and the trial court failed to require the jury to find whether the allegation was true. Based on this premise, defendant concludes the trial court illegally sentenced him to a life term authorized under the deliberation provision. We reject defendant's argument because it is based on a flawed premise.

Section 664 provides that: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished . . . as

follows: [¶] (a) [I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. . . . *The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact*." (Italics added.) In *People v. Bright* (1996) 12 Cal.4th 652 (*Bright*), the California Supreme Court held that the provision in section 664 authorizing a life sentence for a deliberate and premeditated attempted murder constitutes a penalty provision that prescribes the circumstances under which a person convicted of attempted murder will be subject to a greater base term. (*Id.* at p. 656.)

Here, the information charged defendant in count 2 as follows: "[T]he District Attorney . . . . hereby accuses [defendant] of a violation of Penal Code section 664/187, subdivision (a), a felony, in that on or about November 20, 2005, . . . he did willfully, unlawfully, and with malice aforethought attempt the willful, deliberate and premeditated murder of DENNIS DIXON, a human being."

Defendant contends the attempted murder charge as framed failed to provide him with notice that he was subject to the penalty provision for deliberate and premeditated attempted murder. He hinges his argument on the prosecution's failure to allege in a separate paragraph that he acted with deliberation and premeditation, noting "enhancements" typically are alleged in the charging document after the prosecution designates the underlying offense. Defendant concedes the "information deploys the terms 'willful' 'deliberate' and 'premeditated' to describe the attempted murder charge . . . . [b]ut it does so only to describe *the offense* charged therein. It does not describe a separate deliberation enhancement to the attempted murder charge."

Defendant cites no authority to support his position, and it is hard to fathom how the charge in count 2 that he attempted "the willful, deliberate and premeditated

murder of DENNIS DIXON" did not alert him that the prosecution sought to increase his punishment under section 664 for acting with deliberation and premeditation. As *Bright* points out, "the purpose of the charging document is to provide the defendant with notice of the offense charged. [Citation.] The charges thus must contain *in substance* a statement that the accused has committed some public offense, and may be phrased in the words of the enactment describing the offense *or in any other words sufficient to afford notice* to the accused of the offense charged, so that he or she may have a reasonable opportunity to prepare and present a defense." (*Bright*, *supra*, 12 Cal.4th at p. 670, italics added.) This is precisely what occurred here. Although defendant correctly notes the deliberation and premeditation allegation is often alleged in a separate paragraph, it does not follow that the failure to do so here resulted in lack of notice. Instead of a separate paragraph, the prosecution merely combined the deliberate and premeditated penalty provision with the underlying offense of attempted murder. Defendant's claim that count 2 described only the underlying offense of attempted murder fails because deliberation and premeditation are not elements of the crime of attempted murder. As *Bright* explains, section 664's penalty provision for deliberating and premeditating an attempted murder is "separate from the underlying offense and does not set forth elements of the offense . . . ." (*Bright*, at p. 661.) Rather, section 664's penalty provision provides for greater punishment when committed under the "specified circumstances" of deliberating and premeditating the underlying offense of attempted murder. (*Bright*, at p. 661.) Consequently, the inclusion of an allegation that defendant harbored these mental states provided defendant with notice he was subject to the penalty provision for deliberating and premeditating the attempted murder of Dixon. Finally, even if defendant's argument had a scintilla of merit, he forfeited the claim when he failed to object at trial. (*Ibid.*)

Defendant also contends the jury failed to make a finding on the penalty allegation. The verdict form executed by the jury provided, "We, the jury in the above-entitled action, find the defendant, JERRY ALLAN [*sic*] JUDSON, guilty of a violation

of section 664/187, subdivision (a) of the Penal Code, ATTEMPTED MURDER OF DENNIS DIXON, as charged under count 2 of the information."

Defense counsel argued in the trial court this form did not require the jury to make a special "finding of premeditation and deliberation." The trial court disagreed: "If there is no premeditation and deliberation, it's attempted voluntary manslaughter by definition. We don't need to do that [i.e., submit a deliberation finding to the jury]."[3] The trial court declined to provide the jury with defendant's special finding form even though the prosecutor did not object. Defendant argues the prosecution waived application of the penalty provision by failing to have the matter resolved at trial, and as a matter of law this operated as a not true finding on the allegation.

The better practice is to provide the jury with a separate form that requires it to find expressly whether a defendant acted willfully and with deliberation and premeditation during the attempted murder. Indeed, the trial court here instructed with CALJIC No. 8.67,[4] which provided, "You will include a special finding on that question

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[3] Defendant correctly observes Judge Walker demonstrated a misunderstanding of the law of homicide when he inexplicably stated implied malice murder was first degree murder and there was no such thing as attempted murder without premeditation and deliberation. The court stated several times it believed an unlawful killing without premeditation or deliberation could only be voluntary manslaughter. Curiously, Judge Walker's inaccurate view of homicide law contradicted the CALJIC instructions he read to the jury.

[4] "It is also alleged in Count Two that the crime attempted was willful, deliberate, and premeditated murder. If you find the defendant guilty of attempted murder, you must determine whether this allegation is true or not true. [¶] 'Willful' means intentional. 'Deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. 'Premeditated' means considered beforehand. [¶] If you find that the attempted murder was preceded and accompanied by a clear, deliberate intent to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is attempt to commit willful, deliberate, and premeditated murder. [¶] The law does not undertake to measure in units of time the

in your verdict, using a form that will be supplied for that purpose." But defendant does not cite, and our research has not revealed, any authority requiring trial courts to use a special finding form, such as that found in CALJIC. Consequently, we must determine whether the jury's reference to count 2 of the information, which charged defendant with "willful, deliberate and premeditated" attempted murder, satisfies due process. Under these circumstances, we conclude that it does.

Generally, the form of the verdict is immaterial if the jury clearly expresses its intent to convict the defendant of the charged crime. (*People v. Bratis* (1977) 73 Cal.App.3d 751, 763.) This occurs when the jury's guilty verdict refers to a specific count in the information. (*Id.* at p. 764 ["It is sufficient if [the jury] finds [the defendant] guilty by reference to a specific count contained in the information"].)

People v. Flohr (1939) 30 Cal.App.2d 576 (*Flohr*) illustrates the scope of the rule. There, the information charged the defendant with robbery while armed with a gun. Section 1158a required the jury to determine whether the defendant was armed in a "separate verdict . . . for each count which alleges that the defendant was armed."[5] In

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length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. [¶] The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation. [¶] To constitute willful, deliberate, and premeditated attempted murder, the would-be slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decides to kill and makes a direct but ineffectual act to kill another human being. [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true. *You will include a special finding on that question in your verdict, using a form that will be supplied for that purpose*."

[5] Section 1158a provides, "(a) Whenever the fact that a defendant was armed with a weapon either at the time of his commission of the offense or at the time of his arrest, or both, is charged in accordance with section 969c of this code, in any count of the indictment or information to which the defendant has entered a plea of not guilty, the

Flohr, however, the jury returned a verdict form finding the defendant "guilty 'as charged in the information.'" (*Id.* at p. 581.) The appellate court, following Supreme Court precedent requiring courts to construe the verdict form "in connection with the information," held the verdict "equivalent to a finding that he was armed with a gun." (*Id.* at p. 581.)

Similarly, in *People v. Dominguez* (1992) 4 Cal.App.4th 516, the appellate court upheld the defendant's deliberate and premeditated attempted murder conviction even though the trial court failed to provide the jury with a verdict form to record whether the defendant acted with the requisite willfulness, deliberation, and premeditation. Instead, the trial court gave the jury a form requiring it to determine the degree of the attempted murder after providing instructions defining the terms willful, deliberate, and premeditated. Because the jury convicted defendant of "first degree attempted murder," the appellate court held the jury must have found the defendant acted willfully and with deliberation and premeditation. (*Id.* at p. 522.)

Here, like the situation in *Flohr*, the verdict form referred to a particular count in the information, which charged defendant with attempting the "willful, deliberate and premeditated murder of DENNIS DIXON . . . ." Moreover, like the situation in *Dominguez*, the jury received instructions defining the terms willful, deliberate and premeditated in the context of instructions on the crime of attempted murder. We assume the jury followed the court's instructions in determining whether defendant acted with deliberation and premeditation. Their verdict finding defendant

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jury, if they find a verdict of guilty of the offense with which the defendant is charged, or of any offense included therein, must also find whether or not the defendant was armed as charged in the count to which the plea of not guilty was entered. The verdict of the jury upon a charge of being armed may be: 'We find the charge of being armed contained in the . . . count true,' or 'We find the charge of being armed contained in the . . . count not true,' as they find that the defendant was or was not armed as charged in any particular count of the indictment or information. A separate verdict upon the charge of being armed must be returned for each count which alleges that the defendant was armed."

guilty "as charged under count 2 of the information," which included the penalty allegation defendant acted with deliberation and premeditation, satisfies us defendant's due process rights were not violated.

C. *Failure to Instruct on Unanimity*

Defendant next argues the court erred in failing to provide a unanimity instruction concerning the attempted murder of Dennis Dixon. He contends the evidence shows two discrete criminal events or acts upon which the conviction could have been based: the initial gunshot directed at both Wahl and Dixon, and a second shot fired in Dixon's direction.[6]

Defendants in criminal cases have a constitutional right to a unanimous jury verdict. When a defendant is charged with a single criminal act, but the evidence reveals more than one instance of the charged crime, either the prosecution must select the particular act upon which it relies to prove the charge or the jury must be instructed that it unanimously must agree beyond a reasonable doubt that defendant committed the same specific criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) If the prosecution does not make a selection, the court has a sua sponte duty to instruct the jury they must unanimously agree upon the act or acts constituting the crime. (*Russo*, at p. 1132.) For instance, CALJIC No. 17.01, which defendant requested at trial, provides in pertinent part: "to return a verdict of guilty . . . , all jurors must agree that [the defendant]

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[6] In closing argument, the prosecutor told the jurors that, in terms of the "'direct but ineffectual act' element for attempted murder, 'there are two different options that you have.'. . . 'One, it's called the kill zone option under the law. [W]hen he took that [first] shot down the hallway from ten feet, he was just trying to kill. Dennis Dixon was right there. If you believe he was just trying to kill, that he wanted to kill [either Wahl or Dixon] or both of those people with that shotgun, then he is guilty of this.'. . . 'Option two: the second shot. When the defendant took the second shot while in the laundry room, he was intending to kill Dennis Dixon. . . . It's [no] coincidence that [appellant] fired another shot straight in that direction of where Dennis Dixon was running.'"

committed the same [act] [or] [omission] . . . ." (See also Judicial Council of Cal. Crim. Jury Instns. (2009) CALCRIM No. 3500.)

The purpose of the unanimity instruction is to prevent a verdict that results from some jurors believing the defendant committed one act and others believing the defendant committed a different act, without agreement on what conduct constituted the offense. (*People v. Washington* (1990) 220 Cal.App.3d 912, 915-916.) Here, the trial court failed to give a unanimity instruction, and the prosecutor failed to rely on a particular act for the attempted murder count.

A unanimity instruction is not required, however, if the evidence shows a defendant's acts occurred during a "continuous course of conduct." As one court explained, "no unanimity instruction is required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct. 'The "continuous conduct" rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.' [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 275.) "The 'continuous course of conduct' exception — when the acts are so closely connected that they form one transaction — is meant to apply not to all crimes occurring during a single transaction but only to those 'where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the victim's testimony in toto.' [Citation.]" (*People v. Melendez* (1990) 224 Cal.App.3d 1420, 1429, disapproved on other grounds in *People v. Majors* (1998) 18 Cal.4th 385, 408.) In other words, where there is no evidence from which the jury could have found the defendant guilty of one act, but not the other, such as where different defenses are asserted as to each, there is no danger that different jurors would find him guilty of different acts. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

Defendant contends the continuous conduct exception does not apply because the two shotgun blasts posed the risk the jury would fail to unanimously agree

which gunshot constituted the criminal act. Defendant explains some jurors could conclude he intended only to kill Wahl with his first shot and therefore did not aim at Dixon, but convict defendant based on the second shot. Other jurors might convict defendant based on the first shot, but reject guilt for the second shot, concluding defendant did not shoot at Dixon, but instead shot reflexively and wildly into the dark. Defendant therefore concludes the trial court's failure to give a unanimity instruction meant the jurors may have found defendant guilty even though they may not have agreed unanimously on which criminal act he committed.

Defendant's argument is unpersuasive because there is no basis to distinguish between defendant's two acts. The evidence established defendant fired two shotgun blasts in succession within his residence. There is no dispute he committed these acts; indeed, he conceded this at trial, and did not argue the *acts* were distinct and subject to different defenses. Rather, defendant claimed at trial he lacked the requisite mental states for the crimes of murder and attempted murder, arguing he suffered from methamphetamine psychosis, which prevented him from deliberating any act or forming the specific intent for malice. The flaw in defendant's reasoning is his implied premise that the unanimity instruction applies to mental states. It does not. CALJIC No. 17.01, which defendant urged the trial court to give, states that "to return a verdict of guilty, all jurors must agree that [the defendant] committed the same [*act*] [or] [omission]." (Italics added; see also CALCRIM No. 3500 ["You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed"].) As Witkin explains, "Criminal 'acts' are usually affirmative and voluntary physical manifestations of the defendant's will." (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 21.)[7]

[7] The exceptions to this general definition, such as crimes of perjury, conspiracy, and solicitation, are not applicable here.

Thus, there simply is no danger here that different jurors would find defendant guilty of different acts. "'[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case.'" (*People v. Beardslee* (1991) 53 Cal.3d 68, 93.)

Even assuming the trial court should have given a unanimity instruction, the failure to do so is harmless beyond a reasonable doubt. As discussed above, defendant presented a mental defense based on methamphetamine psychosis that prevented him from harboring the mental state for deliberate and premeditated murder. The jury rejected this defense as to both the murder charge and the attempted murder count. The murder charge was based on a single act: the gunshot blast that killed Wahl. Rejection of defendant's mental defense on the murder charge negates any possibility jurors did not unanimously agree defendant also willfully deliberated and premeditated Dixon's attempted murder.

III

DISPOSITION

The judgment is hereby modified (§ 1260) to reflect a conviction of second degree murder on count 1, and to reflect defendant's sentence on count 1 is imprisonment for 15 years to life. The superior court is directed to prepare an amended abstract of

judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.